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No. 167

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In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 467

THOMAS C. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition and record in this case were not filed within the time prescribed by law. The judgment of the Court of Claims was entered on May 3, 1961. On July 26, 1961, Mr. Justice Clark extended the time for filing the petition for a writ of certiorari to and including September 30, 1961. The petition and record were not filed until October 3, 1961. The petition for a writ of certiorari should therefore be

denied for lack of jurisdiction under 28 U.S.C. 2101(c).[1]

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER 1961.

[1] Should the Court believe that the petition should not be denied as untimely filed, the government respectfully requests that it be given an opportunity to file a brief in opposition on the merits.

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In the Supreme Court of the United States

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THOMAS C. SCHMIDT, *Petitioner*

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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MEMORANDUM REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FRANK L. NIKOLAY
COLBY, WISCONSIN
Attorney for Petitioner

MARATHON PRESS WAUSAU WIS

No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1961

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v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

MEMORANDUM REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States has filed a memorandum in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Claims, alleging that the petition for a writ of certiorari should be denied for lack of jurisdiction under 28 U.S.C. 2101(c).

The deadline for filing the petition for a writ of certiorari in this action was September 30, 1961. The records in the office of the Clerk of the Supreme Court of the United States

will show that the petition for certiorari was in fact received at the office of the Clerk of Court on September 30, 1961, and that the transcript and exhibits were filed by the Clerk of the United States Court of Claims on October 3, 1961. A certified copy of the record was filed on October 4, 1961.

The affidavit of mailing, filed under the provisions of Rule 33 (3) clearly shows that the record in this case was mailed to the Clerk of the United States Supreme Court on October 2, 1961.

Under the provisions of Rule 33, it is our position that the "filing" required by Rule 21 of the Supreme Court Rules, is satisfied by depositing the record in a United States Post Office or mailbox, with first class postage prepaid, addressed to the counsel of record at his post office address. Since there is no postal pick-up at the Colby, Wisconsin, post office after 6:30 P. M., on any Saturday, a mailing of the record in this case after that hour on Saturday would have resulted in the record not being on its way until Monday, October 2, the date when, in fact, the record was mailed to the Clerk of the Supreme Court of the United States.

Under date of July 18, 1961, Mr. Wayne A. Roberts, a Chief Deputy Clerk in the office of the Clerk, United States Court of Claims, wrote the attorney for the petitioner as follows:

> "The request for record in re certiorari in the above entitled case has been received in this office, and the record is in the process of being assembled.
>
> Upon receipt of the required $5.00 charge for preparing and certifying the record, it will be mailed to you. As the testimony and exhibits are rather bulky, it is suggested that we mail them directly to the office of the Clerk of the Supreme Court when we have been notified that the record has been filed with them. However, if you would like to have them sent to you, we will do so. In any event, the "record" will be sent to you."

Under date of September 12, 1961, the attorney for the petitioner wrote the Hon. Willard L. Hart, Clerk of the United States Court of Claims in reference to this matter as follows:

> "It is requested that you mail the testimony and the exhibits directly to the office of the Clerk of the Supreme Court, as you suggest in your letter of July 18, 1961."

In response to that letter of the attorney for the petitioner, the Chief Deputy Clerk of the United States Court of Claims mailed the attorney for the petitioner a receipt dated September 15, 1961, indicating the receipt of $5.00 and, "preparing and certifying record in re certiorari". No further communication was had between the office of the Clerk of the United States Court of Claims and the attorney for the petitioner and on the basis of the request of September 12, 1961, from the petitioner's attorney and the responsive receipt indicating that the record had been prepared and certified led the petitioner to believe that the record had in fact been certified to the office of the Clerk of the Supreme Court of the United States. Petitioner had no notice that the record had not been filed with the Clerk of the Supreme Court of the United States until a telephone call was received from the office of the Clerk of the Supreme Court of the United States on October 2, 1961, advising of the receipt of the petition for writ of certiorari in this matter and indicating that a transcript of the record in the case had not been filed by the Clerk of the United States Court of Claims. Petitioner then immediately telephoned the Clerk of the United States Court of Claims to inquire as to why the transcript of the record in the case had not been filed and the Clerk of the United States Court of Claims then immediately forwarded the transcript and exhibits to the office of the Clerk of the Supreme Court of the United States.

Since the rules of the Supreme Court were technically complied with by a timely deposit of the record in the United States mail and since it was through no fault of the petitioner herein

that the record had not been filed with the Clerk of the Supreme Court, petitioner respectfully submits that the application for certiorari was made within the time limited, and that the Court does have jurisdiction under 28 U.S.C. 2101(c).

Respectfully submitted.

FRANK L. NIKOLAY

Attorney for Petitioner.